No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1921

MALCOLM DOUGLAS and BERT C. ROSS, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, *Appellants.*

v.

LEON NOBLE, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANTS.

L. L. THOMPSON,
Attorney General of the State of Washington,

MALCOLM DOUGLAS,
Prosecuting Attorney of King County, Washington,

BERT C. ROSS,
Deputy Prosecuting Attorney of King County, Washington,
Solicitors for Appellants.

Office and Postoffice Address:
Temple of Justice, Olympia, Washington.

THE ARGUS PRESS, SEATTLE

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STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of the United States for the Western District of Washington, enjoining the prosecuting attorney and deputy prosecuting attorney of King County, Washington, from enforcing the provisions of a statute of Washington regulating

the practice of dentistry in that state (Record, p. 37).

The bill of complaint alleged that the complainant is a reputable dentist, a graduate of the Pacific Dental College, of Portland, Oregon, and that he has been engaged in the practice of that profession since the year 1909 (Record, p. 1). It further alleged that complainant has tried upon three occasions to pass the examination prescribed by the state board of dental examiners of the state of Washington for persons desiring to secure a license to practice dentistry, but that the board each time refused to grant him such a license (Record, p. 3). The bill contained appropriate averments showing that the defendants had caused him to be arrested for practicing without a license and had threatened to continue that action unless he would desist from said practice (Record, p. 2). It likewise alleged that the acts in question under which defendants threatened to proceed were in violation of the Fourteenth Amendment to the Federal Constitution and contained the usual prayer for injunctive relief.

The defendants (1) by answer in lieu of a demurrer challenged the sufficiency of the facts set forth in the bill (Record, p. 6), and (2) denied that the state board of dental examiners had ever arbitrarily refused to grant complainant a license to practice dentistry (Record, p. 8).

The application for a temporary injunction was heard before a circuit judge and two district judges, which judges by unanimous conclusion directed a temporary injunction to issue (Record, p. 29). No formal temporary injunction, however, was ever filed, and subsequently the case came on for final hearing before the district judge. The final hearing was had upon the bill of complaint and the answer, no evidence being taken, at which time a permanent injunction was given perpetually enjoining the enforcement of the act by the defendants (Record, p. 37).

SPECIFICATIONS OF ERROR

It is submitted that the District Court erred in the following particulars:

1. In granting a temporary injunction.

2. In denying defendants' prayer for the dismissal of the bill of complaint.

3. In granting an injunction perpetually enjoining these defendants from enforcing the provisions of Sections 8412 to 8425, inclusive, of Remington's 1915 Code of Washington.

4. In holding that section 8416 of Remington's 1915 Code of Washington relating to the examination of persons desiring to engage in the practice of dentistry in Washington to be void.

5. In holding that said statute conferred autocratic and arbitrary powers upon the state board of dental examiners and that said statute was in conflict with the Constitution of the United States and the Fourteenth Amendment thereto.

ARGUMENT

The foregoing specifications of error in substance involve but one question, to-wit: The constitutionality of Section 8416, Remington's 1915 Code of Washington, and for that reason need not be separately discussed. Section 8412, Rem. 1915 Code, provides for the creation of a board of dental examiners to consist of five practicing dentists. Section 8416, Rem. 1915 Code, provides:

> "Any person or persons seeking to practice dentistry in the state of Washington, or to [own], operate or cause to be operated, [or to run or manage] a dental office or place for the practice of dentistry in the state of Washington after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful

possession of the same: Provided, this section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this act who are bona fide citizens of the state of Washington. All persons successfully passing such examination shall be registered as licensed dentists in the board register as hereinafter provided, and also receive a certificate, said certificate to be signed by the president and secretary of said board and in substantially the following form, to-wit:

"This is to certify that..... is hereby licensed to practice dentistry in the state of Washington. This certificate must be filed for record in the office of the auditor of any county in which the party holding such certificate desires to practice, and it is unlawful for him (or her) to practice dentistry in any county in which said certificate is not filed for record.

"Dated at..... this..... day of....., A. D. 190.....

("President of said board of examiners.)

....., ("Secretary of said board.")

Section 8417, Rem. 1915 Code, provides:

"The certificates in this chapter provided for shall entitle the holder thereof to practice dentistry in any county in the state of

Washington: Provided, such certificate shall first be filed for record in the office of the auditor of the county in which such holder desires to practice, and nothing herein contained shall be construed to permit any holder of any certificate to practice in any county in this state unless such certificate shall have been first recorded in the office of the auditor of such county as herein provided: Provided further, that any such holder of a certificate may practice in more than one or any number of counties in this state on having such certificate recorded in each of such counties in which such holder desires to so practice. Said board of dental examiners shall, upon satisfactory proof of the loss of any certificate issued under the provisions of this chapter, issue a new certificate in place thereof. Any person failing to pass the first examination successfully may demand a second examination at a subsequent meeting of said board, and no fee shall be charged to [for] said examination: Provided, that the second examination is taken before the expiration of one year."

Section 8421, Rem. 1915 Code, provides that any person who shall practice dentistry without having recorded his certificate to practice with the county auditor shall be guilty of a misdemeanor, and upon conviction shall be fined in

any sum not less than $50.00 nor more than $200.00, or be confined in the county jail for a period of not to exceed six months.

The conclusion of the District Court announced in the memorandum decision filed upon the motion for a temporary injunction was made the basis of the final decree, and is premised upon an alleged defect in Section 8416, *supra*, in that the District Court concluded that this section granted arbitrary and unlimited power to the state board of dental examiners because it failed to prescribe any standard which should govern the board in giving these examinations, and likewise failed to expressly prohibit arbitrary or unlawful action by the board. The correctness of this conclusion is the only point involved in the case.

I.

The Construction of the Statute by the State Court

Assuming for the purpose of argument that such a statute, if originally presented to this court for construction, would contravene the Fourteenth Amendment, we submit that as construed by the Supreme Court of Washington, which is the highest court of that state, it is subject to no valid constitutional objection. The act was first considered and sustained by that court in the case of *In Re Thompson*, 36 Wash. 377. In that action the statute was attacked, among

other things, upon the ground that Section 8416, *supra*, conferred arbitrary powers upon the board of dental examiners. This appears quite conclusively from the following excerpts which we have taken from petitioner's brief in the *Thompson* case, a copy of which is on file in the law library of the Supreme Court of the state of Washington, at Olympia, Washington, and to which reference was also made by the appellants in their petition for a re-hearing in the District Court (Record, pp. 31 and 32). For instance, upon page 13 of petitioner's opening brief in the *Thompson* case, the following statement appears:

> "Nothing is said about what they shall be examined in, nor to what extent, nor what the examination shall be, whether physical or otherwise; nor does it say that the examination shall relate to dentistry, or test the qualifications of the applicant to practice dentistry."

Likewise, upon page 15 of that brief the petitioner said:

> "The act does not control and regulate the action of the board. The board in prescribing an examination, to which all must submit, and setting up standards of qualifications, according to its own will and caprice to be enforced or not enforced as they see fit, or in such manner as they see fit, is acting entirely outside the domain of law and

in the realm of the lawless; such action is not warranted by law, and is actually forbidden by the fundamental law of the land."

The same argument was again reiterated upon page 17 of the opening brief and also upon pages 2 and 3 of petitioner's reply brief in the *Thompson* case. While the state court does not expressly state this contention in the language in which it was set forth in the brief, it was apparently considered, because upon page 379 of the decision the court said:

"No power of legislation is conferred by the act upon the dental board, unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized. There is nothing in the record before us to indicate that the dental board have adopted any rules, arbitrary or otherwise, but assuming that the board have adopted some rules—as they certainly must, in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to *conduct the examinations upon subjects reasonably required in that profession* —we must assume in this proceeding that such rules are reasonable *and within the scope and purview of the act.* That the board may adopt unreasonable, unwarranted, or purely arbitrary rules for the exam-

> ination of applicants cannot be presumed to defeat the act. Unless the act itself is void, arbitrary or void rules, *made without authority of the act*, cannot render it so. The remedy of petitioner for an *abuse of the powers* of the dental board is not an attack upon the act creating the board, *but must be found in some appropriate proceeding to review the conduct of the board.*" (Italics ours.)

The learned District Court discusses this portion of the opinion of the state Supreme Court in the following language (Record, p. 16):

> "The court evidently assumed that the board had adopted such rules and that they were reasonable rules, and, inferentially, that they had followed such rules; and further that they could be depended upon to continue to do so. This appears to us to be a non-sequitor."

This conclusion of the District Court, it would seem fails to notice the statement of the Washington court that in the absence of evidence to the contrary it will assume any rules which have been promulgated to be reasonable "*and within the scope and purview of the act.*" It likewise overlooks the further statement of the state court that rules made "*without authority of the act*" cannot render the act itself void. It likewise overlooks the statement that, in the absence

of a showing to the contrary, it will assume that if any rules have been adopted, such rules provided for examination upon subjects reasonably required in that profession. The same construction was later announced in the case of *State ex rel. Brown v. State Board of Dental Examiners*, 38 Wash. 325. In that case the court refused to sit as an appellate tribunal to re-examine the action of the board in refusing to pass an applicant for a license to practice dentistry, and we think properly so under the decision of this court in *Reetz v. Michigan*, 188 U. S. 505. At the same time, however, it made the following observation with respect to the powers and duties of this board (Op., p. 328):

> "But, notwithstanding this, it is equally well established that courts will compel by mandamus the honest performance of official duty, and, if, under pretense of exercising discretion, the power is exercised with manifest injustice or is grossly abused, or duty is avoided, the courts will grant relief. The action of the court must, in reality, be based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed; because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law itself,

> it has not strictly, as is frequently said, 'abused its discretion'—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted, for the honest discretion demanded by the law. In such cases the law will, by mandamus, compel the tribunal to act honestly and fairly, or, in other words, *to exercise its discretion;* and, when this distinction is kept in mind, the seeming difficulties which have surrounded this question, and which have caused so much discussion, disappear."

We interpret the language of these two decisions to mean that examinations held under this statute are required to be restricted to those matters which have some relation to the qualifications of an applicant seeking a license to practice the profession of dentistry in the state. If such be the proper interpretation, then there can be no doubt upon the main question under the authority of *Dent v. West Virginia*, 129 U. S. 124. In the *Dent* case this court sustained a statute of Virginia which prohibited the practice of medicine and surgery unless the practitioner possess a license. Licenses were required to be issued by the state board of health.

Under the terms of the act graduates of certain medical colleges and persons who had practiced the profession for ten years were licensed to practice without examination. All other persons were examined by the state board of health and an applicant was only entitled to a license from the board if "upon full examination they find him qualified to practice medicine in all of its departments." The statute, as does the one at bar, prescribed no specific standard for the board to follow; neither did it in express terms prohibit arbitrary action by the board. The only direction was that the board should find the applicant qualified to practice medicine. This statute was held not to be inconsistent with any provision of the Fourteenth Amendment to the National Constitution.

Whatever may be the proper construction of the Washington statute as an original proposition, the decision of the Washington Supreme Court in the *Thompson* and *Brown* cases, *supra*, gives to that act a meaning which, if it be accepted, renders that statute and the West Virginia act, sustained in the *Dent* case, incapable of differentiation. It is, of course, unnecessary to do more than cite some of the decisions of this court in which it has been held that the construction affixed to a state statute as to a state matter by a court of last resort of a state is binding upon the Federal courts.

Quong Ham Wah Co. v. Industrial Accident Commission, 255 U. S., 445; 41 Sup. Ct. Rep. 373, and cases cited therein.

II.

The Act Does Not Delegate Arbitrary Power or Authorize Unconstitutional Action

Assuming, however, that this court shall undertake to itself construe this statute without respect to the decisions of the Washington court, it is submitted that the statute when so considered is free from valid objection. Section 8412, Rem. 1915 Code, provides that the members of the state board of dental examiners must be practicing dentists. This section therefore necessarily presupposes that the duties of the board shall be such as will make professional knowledge necessary to the successful performance of those duties. The only duty which the board has is the duty under Section 8416, *supra*, to examine applicants and issue certificates to practice. These examinations, however, under the provisions of the same section, can only be given graduates of dental colleges of good standing. If the intent of the statute was to vest in the board unlimited and arbitrary power, an intent expressly denied in the *Thompson* case, *supra*, it is difficult to see why the state legislature required the members of the board to be practicing dentists or why it required applicants to present evidence of

graduation from a reputable dental school. The only reasonable explanation which we can find for the two provisions is to construe the statute as providing for examination upon matters calculated to test the applicants' professional knowledge of dentistry. If that construction be adopted, then the reason why board members were required to be dentists and applicants to be graduates of dental schools becomes at once apparent. Again, Section 8416, *supra*, provides for the *examination* of such applicants. The word "examination," as applied to professions, is defined in Webster's International Dictionary as follows:

> "A process prescribed or assigned for testing qualifications; as, the examination of a student or of a candidate for admission to the bar or the ministry."

We find it difficult to square this definition with the statement of the learned District Court that "in fact, the letter of the statute does not even command or direct that the examination shall relate to his qualifications to practice dentistry." (Record, p. 20). The command of the statute is that the applicant, upon payment of a fee, shall be examined, or, paraphrasing the language of the definition above quoted, that his qualifications to practice dentistry shall be tested by the board, and whenever they are made to appear, the certificate to practice shall issue. An examination upon subjects not related to the profession, such

as the District Court suggested would be possible under the act, would not be an examination either in fact or under the statute. We also add that we have found no decision of the Supreme Court of Washington which denies the judicial power of the courts of Washington to enforce compliance with the mandate of the statute in proper cases, and indeed, in *State ex rel. Brown v. State Board of Dental Examiners, supra*, the power of the court to act in such cases was affirmed.

It is submitted that this statute, when liberally construed, in no wise differs from the act considered in *Dent v. West Virginia, supra*, and that upon the authority of that case it should be sustained.

III.

The Fourteenth Amendment Does Not Require Express Legislative Prohibition of Arbitrary Action by State Administrative Officers in Statutes Vesting Administrative Powers in Such Officers

For the purpose of considering this point, we shall temporarily assume the fallacy of the points heretofore advanced, that is to say, we shall assume (1) that the statute has never been construed by the state court insofar as this question is concerned, and (2) that when construed by this court it should be held as lacking in any express prohibition of arbitrary action by the

state board of dental examiners. In this connection we must at all times recollect that the case does not involve any particular alleged arbitrary action by the board. This was alleged in the bill by general conclusion, and was denied by the defendants but no proof was submitted, the District Court being of the opinion that the statute was void upon its face without regard to the question of whether, in fact, the board had acted arbitrarily. We quote from the memorandum decision of the District Court:

> "The case is not one of the board's abuse of powers lawfully conferred; but the abuse and wrong consist in undertaking to confer unlimited powers" (Record, p. 21).

It was the contention of the appellee, and also the view of the District Court that where the right of a citizen to pursue an occupation might under the police power and subject to certain limitations be made dependent upon the permission of an administrative officer, then that statute must prohibit arbitrary action by that officer either by a definition of the officer's jurisdiction or by express words of prohibition, and that if it fail so to do, it should be held void upon its face. It was the contention of the appellant that where the right to follow an occupation is under some circumstances subject to the police power, then the issuance of permits to pursue that occupation may, in general terms, be entrusted to an

administrative officer without express words of prohibition or arbitrary action, since the courts are bound to presume the regularity of administrative action until the contrary is made to appear, in which event persons adversely affected will be afforded judicial relief. This contention however, is subject to one exception which is illustrated by the decision of this court in *Yick Wo v. Hopkins*, 118 U. S. 356. That exception is that where it is made to appear to the court that administrative officers and state courts have generally construed and enforced a state law in such a way as to violate the National Constitution, then that law will be adjudged invalid upon its face, even though a contrary conclusion might have been reached had the statute originally been presented to the Federal Court for constitutional investigation without any showing of arbitrary construction or action by local authorities thereunder.

We shall consider this question principally from the standpoint of precedent, for the reason that we believe the point to be already covered by several well considered decisions of this court. The District Court cited but two decisions of this court in favor of its conclusion, the opinion being largely premised upon various state decisions. Those two decisions were *Dobbins v. Los Angeles*, 195 U. S. 223, and *Yick Wo v. Hopkins*, 118 U. S. 356. We are unable to perceive the application

of the *Dobbins* case, *supra*. That case merely held that a city could not arbitrarily prevent the construction of a gas works within its corporate limits where the public welfare would admittedly not be subserved by such a prohibition. The case in no way involved the general exercise of delegated powers by an administrative officer, but merely the alleged arbitrary action of a legislative body in seeking to exercise the police power over a subject not properly subject to that power. Since the opinion of the District Court concedes that the case at bar does not involve the "abuse of powers lawfully conferred," then irrelevance of the *Dobbins* case is at once apparent.

The case of *Yick Wo v. Hopkins*, 118 U. S. 356, is of more seeming materiality, but when rightly understood is clearly distinguishable. That case involved the validity of a municipal ordinance of the city and county of San Francisco which prohibited the operation of laundries located in wooden buildings in said city and county unless a permit be first obtained from the board of supervisors. While the ordinance did not, in terms, discriminate against members of the Chinese race, it was shown by competent testimony that over two hundred Chinese had petitioned for permits, all of which had been refused, whereas over eighty persons of other races whose business was exactly analogous had been allowed to do business. The ordinance was attacked upon grounds

stated in the opinion of the court as follows (Op., p. 369):

> "It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the Fourteenth Amendment, and, *in the alternative*, if not so, that they are void by reason of their administration operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances; an unjust and illegal discrimination, it is claimed, which, though not made expressly, by the ordinances, is made possible by them." (Italics ours.)

It will be observed that the petitioners in that case not only made the contention that the act was void upon its face, but that they also contended in the alternative that however innocent the ordinance might have been in its inception it had since become invalid by state administrative and judicial construction. The case was decided by this court and the ordinance held invalid under the latter alternative and the court did not pass upon the question of whether it would have held the ordinance void if there had been no showing of continued arbitrary action thereunder. We quote from that portion of the de-

cision where the court, after quoting at length from a decision of the court of appeals of Maryland, said (Op. p. 373):

> "* * * In the present cases, we are not obliged to reason from the probable to the actual and *pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration.* For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance*, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Italics ours.)

This quotation conclusively shows that the basis of the decision of the *Yick Wo* case was the illegal construction and enforcement of the ordinance by state administrative and judicial authorities and not the fact that the ordinance failed to expressly prohibit arbitrary action. To illustrate: If the state board of dental examiners had construed this law as permitting them to prohibit the licensing of persons under the age of thirty years, and this construction had been sustained by the courts of Washington, then the *Yick Wo* case would be applicable. We have already shown, however, that there is no evidence of favoritism or partiality produced against the board in the present action. The distinction between the two cases, therefore, is so self evident as to make further discussion superfluous.

We consider now a few instances in which this court has had occasion to consider the validity of such a statute where there is no showing of arbitrary action either by state judicial construction or administrative application and enforcement. The most analogous case upon the subject is *State ex rel. Lieberman v. Van De Carr*, 199 U. S. 552. That case involved the validity of

Section 66 of the sanitary code of New York City, which provided:

> "No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof."

As far as we can ascertain from an examination of the reported case, this ordinance failed to expressly establish any standard for the guidance of the city board of health, nor did it expressly prohibit arbitrary action by that board. It was affirmed by the court of appeals of New York in *People ex rel. Lieberman v. Van De Carr*, 175 N. Y. 440. This decision does not construe the ordinance as establishing any standard, nor as itself prohibiting arbitrary action by the board. The court did, however, indicate that if it should thereafter be made to appear to the court that the board had acted arbitrarily, then the court would have power to act. With this state judicial construction announced the ordinance came before this court in *State ex rel. Lieberman v. Van De Carr*, 199 U. S. 552. The court will immediately observe the analogy between the two cases. The sanitary code of New York prohibited persons from engaging in the occupation of selling milk, an occupation, to follow which, a citizen ordinarily has a constitutional right except upon conditions to be pre-

scribed by an administrative board. The dental act prohibits persons from engaging in the practice of the profession of dentistry except they successfully pass an examination to be given by a similar administrative board. The New York ordinance was, to a larger extent, lacking in any express legislative standard than is the Washington act because the phraseology of the sanitary code indicated in no manner the scope of the conditions to be imposed by the city board of health, whereas we have already shown that the word "examination" in the Washington act impliedly, if not expressly, confines the board of dental examiners to the testing of the professional qualifications of applicants.

The New York court made no express findings upon the question of whether this ordinance permitted arbitrary action, but merely observed that injunction would not lie because it did not appear that the board of health had acted arbitrarily and that in the absence of such a showing regularity of action by that board would be presumed by the court. The Washington Supreme Court in the *Thompson* and *Brown* cases, *supra*, construed this statute to authorize examinations upon subjects reasonably calculated to test the qualifications of the applicant to practice dentistry. Furthermore, in the *Brown* case, it expressly held that arbitrary or fraudulent action by the board would be subject to judicial review in a proper

case. In affirming the decision of the New York court of appeals, this court, after quoting from a portion of the New York decision in which that court had apparently recognized the absence of any express prohibitory words in the ordinance but had also affirmed its own power to protect the constitutional rights of citizens, said (Op. p. 560):

> "We do not think that this language leaves any question as to the disposition of the highest court of New York to prevent the oppression of the citizen or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt."

The view of the district court is squarely opposed to the doctrine announced in the *Lieberman* case. That view is tersely stated in the memorandum opinion in the following language (Record, p. 21):

> "The case is not one of the board's abuse of powers lawfully conferred; but the abuse

and wrong consist in undertaking to confer unlimited powers."

This view fails to distinguish between a statute which in affirmative language directs a public officer to perform an unconstitutional act and one which directs him to follow a general lawful course of conduct without expressly prohibiting arbitrary action. In the first case the statute will be adjudged invalid upon its face because there is nothing upon which it may legally operate. In the second, the statute stands because arbitrary action is not presumed, but where an officer seeks to act illegally thereunder, his individual action will be restrained.

The *Lieberman* case cites with express approval the cases of *Davis v. Massachusetts*, 167 U. S. 43, and *Wilson v. Eureka City*, 173 U. S. 32. In the *Davis* case an ordinance of the city of Boston providing that no person might make a public address upon the public grounds of the city without first obtaining a permit from the mayor was held not to be in conflict with the Fourteenth Amendment, although no express limitations were imposed upon the mayor in the matter of issuing permits and the contention was made that the ordinance was invalid because it sought to vest unlimited power in that officer.

In *Wilson v. Eureka City*, a municipal ordinance which vested in a city officer unlimited discretion in the matter of issuing permits to

move buildings upon the city streets was attacked "because the ordinance commits the rights of plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law." Upon the authority of *Davis v. Massachusetts* this ordinance was by this court sustained.

The *Lieberman* case was also cited with express approval in *Engel v. O'Malley*, 219 U. S. 128. That case involved the validity of a statute of New York which provided that no person might engage in the business of banking unless he first secure a permit from the comptroller of banking, of that state. The act did not specifically designate the considerations which should guide the comptroller in passing upon a given application, and neither did it in express terms forbid arbitrary action upon his part. The official report of the case shows the following contention to have been made by appellant (Op. p. 129):

> "The statute is unconstitutional because it gives the comptroller arbitrary power to deprive appellant of his right to carry on his business."

This contention was answered by the court when, after suggesting that possibly there was some standard established, it said (Op. p. 137):

> "But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it unnecessary to consider; for the

power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached."

The same thought was emphasized in *Hall v. Geiger-Jones Co.*, 242 U. S. 539, although the case is to some extent distinguishable upon the facts. That statute involved the statute of Ohio which prohibited the sale of securities except a permit be first obtained from the state public service commission. The only standard established for the guidance of the commission was the requirement that before it issued a permit it should "be satisfied of the good repute in business of such applicant." It was contended that this, in effect, established no standard "to guide or determine the decision of the commissioners." After suggesting that repute in business seemed to be a sufficiently tangible attribute, this court apparently in the alternative, further observed (Op. p. 554):

"The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. *Pending such review, we must accord to the commissioner a proper sense of duty and the presumption that the functions intrusted to him will be executed in the*

public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer. * * *; and, as we have said, in cases where there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review." (Italics ours.)

While the dental law does not expressly give any judicial review of the action of the board, the Supreme Court of the state in the *Brown* case, *supra*, has held that jurisdiction to exist where arbitrary action appears. In so far as persons affected by the act are concerned, therefore, the result here is the same as in the *Geiger-Jones* case. It obviously makes no difference in so far as the Fourteenth Amendment is concerned whether a person's constitutional rights are protected by state courts pursuant to the command of a specific statute in a particular case, or by judicial action based upon the general powers of the local courts. The silence of a state statute with respect to judicial review, when accompanied by a state judicial exercise of jurisdiction, is the constitutional equivalent of express statute created jurisdiction.

Even if the question be considered purely from the standpoint of principle, it seems to us self-evident that these decisions are sound. The Fourteenth Amendment prohibits the taking by

a state of life, liberty or property without due process of law, and likewise the denial to any person of the equal protection of the law. The courts, both state and Federal, are the instruments created by our form of government to enforce this constitutional command. It will be conceded that the public welfare may not only justify, but require, the prohibition of the practice of dentistry by certain persons, dependent upon the existence of particular facts such as the professional qualifications or the physical health of a would-be practitioner. It must also be conceded that the ascertainment of those facts, involving as it often does, technical professional matters with which the courts are necessarily unacquainted, may be properly entrusted to administrative officers. In such event the only constitutional right which an interested person may have is the right to be protected from arbitrary action by such administrative officers. *Reetz v. Michigan*, 188 U. S., 505. If he is afforded that protection by the state courts, in what way can he be injuriously affected by the fact that those courts failed to find express authority to act in the particular statute which prescribes generally the powers and duties of the administrative officer. We submit that it is sufficient that his rights are preserved by state judicial authority and if they are so protected, what occasion or necessity is there for the intervention of a Federal court of equity. Federal

courts quite properly are hesitant to stay the hand of a state officer, and will not do so except for substantial cause. The conclusion of the Supreme Court of Washington in the *Brown* case, *supra*, that it had not only the power, but the duty, to prevent arbitrary action under this statute must be taken as a substantial equivalent of a holding that the statute did not authorize arbitrary action since that statute was at the same time sustained. In so far as the Fourteenth Amendment is concerned, what substantial difference is there between a statute which does not authorize unconstitutional action and one which prohibits that action where the state courts are ready and willing to protect all constitutional rights if threatened thereunder? The same result is obtained in both instances, the only difference being that in the one case the National Constitution is observed by a negative action, and in the other by an affirmative declaration. The Fourteenth Amendment, we submit, was designed to govern the affirmative actions of state legislative bodies, and was not intended to so operate as to require every legislature whenever it acts under the police power to expressly direct its law enforcement officers not to violate the National Constitution. It is true that when the negative action of the legislature is by state administrative and judicial construction and enforcement found to authorize unconstitutional acts, then a Federal

court will restrain its enforcement. *Yick Wo v. Hopkins*, 118 U. S. 356. This is not upon the theory, however, that it is the duty of a state legislature, whenever it enacts a statute, to anticipate unlawful action upon the part of state officers and courts and to prohibit that action by express language, but is rather premised upon the fact that state judicial and administrative construction have construed a statute, originally innocuous and proper upon its face, as constituting an affirmative authorization to state officers to violate the Federal Constitution. In such event the statute by construction thus passes into the category of cases where the legislature has attempted to do an unlawful thing, and of course will be held void.

The case at bar is entirely lacking in the features presented to this court in the *Hopkins* case, *supra*, and is, we submit, governed by the other line of cases to which we have already referred.

RECAPITULATION

1. This statute as construed by the Supreme Court of Washington in *In Re Thompson*, 36 Wash. 377, and *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325, requires these examinations to be restricted to those matters which are pertinent to the practice of dentistry and is therefore valid under the authority of *Dent v. West Virginia*, 129 U. S. 124.

2. This statute, even if subject to original

construction by this court, provides for examinations analogous to those provided for in *Dent v. West Virginia, supra*, and upon the authority of that case is valid.

3. The Fourteenth Amendment does not require express prohibition of arbitrary action by administrative officers, and a failure to incorporate such a prohibition in a state statute will not invalidate that statute unless it appears that state courts and administrative officers have generally construed the statute to permit arbitrary action. Since the record is silent as to administrative construction and the judicial construction of the courts of Washington interprets the statute to prohibit arbitrary action, it will be presumed that the administrative officers will follow the judicial view, in which event the act is not subject to sound constitutional objection.

The judgment of the District Court was erroneous and should be reversed.

Respectfully submitted,

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